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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LOREAN BARRERA, On Behalf of
Herself and All Others Similarly
Situating and the General Public,

Plaintiff,

vs.

PHARMAVITE, LLC, a California
limited liability company,

Defendant.

Case No.: 2:11-CV-04153-CAS (AGR_x)

CLASS ACTION

**SUPPLEMENTAL MEMORANDUM
OF LAW IN SUPPORT OF
PHARMAVITE LLC'S MOTION TO
COMPEL DISCOVERY**

LOCAL RULE 37-2.3

Date: November 6, 2012
Time: 10:00 a.m.
Courtroom: B – 8th Floor

Discovery Cutoff Date: None Set

Pretrial Conference Date: None Set

Trial Date: None Set

INTRODUCTION

While Plaintiff asserts that her claim is about “false advertising, nothing more” and thus her medical information is not relevant to this litigation (Joint Stip. at 3), the allegations of her complaint belie this argument. Plaintiff specifically alleges that she “purchased the TripleFlex Triple Strength product *to relieve her joint pain.*” Second Amended Complaint at ¶ 7 (emphasis added). She further alleges that she took the TripleFlex Triple Strength “as directed,” but it “did not help improve [her] joint ‘comfort, mobility, or flexibility.’” *Id.* ***These allegations necessarily implicate her medical condition – more specifically, her joint problems.*** In making these allegations, Plaintiff unquestionably has placed her medical condition into issue. Pharmavite, accordingly, served ***narrow*** requests directed specifically to the condition at issue, nothing more. Pharmavite is not seeking information or documents about Plaintiff’s health in general, but rather has requested only information and documents about the focused issue of Plaintiff’s joint health, *i.e.*, the reason she purchased Pharmavite’s TripleFlex Triple Strength in the first place. Pharmavite must be permitted to explore and test the validity of Plaintiff’s allegation that she experienced joint pain, as well as her allegation that such pain was not relieved by her use of Pharmavite’s product. By making these allegations without permitting access to her relevant medical records – or even to information about her joint health from sources other than medical records – Plaintiff is arguing that Pharmavite and the Court should blindly trust that what she is saying is a true and complete picture of her circumstances, without exploring any evidence relevant to those circumstances.¹ It is inappropriate, however, to require a defendant or Court to

¹ For example, Interrogatory no.8 asked Plaintiff to identify “all health concerns Plaintiff intended the TripleFlex Products to address, including the specific location on Plaintiff’s body of any concern, the length of time of the concern, and whether or not Plaintiff has ever sought any medical treatment related to the health concern.” Plaintiff implicitly acknowledges that this information is relevant by responding that she purchased the product to “relieve joint pain in her right knee and

1 simply accept claims in a complaint as true. “[A]n important purpose of discovery is
 2 to reveal what evidence the opposing party has, thereby helping determine which
 3 facts are disputed . . . and which facts must be resolved at trial.” *Computer Task*
 4 *Group, Inc. v. Brotby*, 361 F.3d 1112, 1117 (9th Cir. 2004). Pharmavite has an
 5 absolute right to discover information relevant to Plaintiff’s claims and its defenses.

6 ARGUMENT

7 Plaintiff admits that she needs to establish a number of elements to prove her
 8 claims, including reliance. Joint Stip. at 15. It is not enough for Plaintiff to simply
 9 allege that she “satisfies this requirement because she relied on the representations.”
 10 *Id.* Although reliance can be presumed under certain circumstances, that presumption
 11 is rebuttable, and Pharmavite has a right to conduct discovery relevant to the issue of
 12 Plaintiff’s claimed reliance on the statements on Pharmavite’s label. *See Kwikset*
 13 *Corp. v. Superior Court*, 51 Cal. 4th 310, 326, 120 Cal. Rptr. 3d 741 (2011). Any
 14 number of factors could have shaped and influenced Plaintiff’s decision to purchase
 15 TripleFlex Triple Strength, including her joint discomfort, her experience with other
 16 supplements or medications, information from health care providers and others, etc.,
 17 all of which could arguably demonstrate that reliance was not uniform across the
 18 proposed class. *See, e.g. Champion v. Old Republic Home Protection*, 272 F.R.D. 517,

19
 20 her wrists,” but apparently believes that this is *all* that Pharmavite is entitled to know,
 21 and refused to let Pharmavite know the length of time that Plaintiff experienced joint
 22 pain in her right knee or her wrists, or whether Plaintiff ever sought any medical
 23 treatment for such pain. ***There is no justification for Plaintiffs’ chosen limitation on***
 24 ***the health-condition information she provided to Pharmavite.*** Similarly, Plaintiff
 25 refused to provide any substantive response at all to Interrogatory no. 14, which
 26 narrowly asked for information about health care providers with whom Plaintiff
 27 consulted about her musculoskeletal system, objecting that the inquiry is overbroad
 28 because it asks about *all* health care provides with whom Plaintiff consulted about her
 musculoskeletal system, even though Pharmavite did not ask about *all* health care
 provides with whom she has consulted about *any* ailment, illness or condition she
 ever experienced, just the condition she put into issue in this action. The Court
 should not permit Plaintiff to prevent any examination into claims she herself alleges
 in this action.

1 537 (S.D. Cal. 2011); *Davis-Miller v. Automobile Club*, 201 Cal. App. 4th 106, 122-
2 23, 134 Cal. Rptr.3d 551, 563 (2011) (“if the issue of materiality or reliance is a
3 matter that would vary from consumer to consumer, the issue is not subject to
4 common proof, and the action is not properly not certified as a class action.”)
5 Furthermore, a presumption as to reliance is only demonstrated to be “sufficient to
6 allege causation” and get past the pleading stage. *Kwikset*, 120 Cal. Rptr. 3d at 757.
7 Discovery, however, must look beyond the pleading stage to allow parties to discover
8 evidence that is relevant or reasonably calculated to lead to the discovery of evidence
9 admissible at trial on the merits of the case. Here, narrow discovery of Plaintiff’s
10 medical information with respect to her musculoskeletal system and alleged joint
11 discomfort unquestionably is relevant to (not to mention reasonably calculated to lead
12 to the discovery of admissible evidence concerning) whether Plaintiff relied on the
13 product’s label, whether she received any benefit from the product, or whether she
14 even could have expected to receive any benefit from the product.

15 While Plaintiff argues that California courts have limited the application of the
16 patient-litigant exception to instances where a party has brought personal injury
17 claims, the cases cited by Plaintiff, *i.e.*, *Johnson v. General Mills, Inc.*, Case No. 10-
18 61-CJC (C.D. Cal.) (order dated Nov. 9, 2010), and *Johns v. Bayer Corporation*,
19 Case No. 09-cv-1935-AJB (POR) (S.D. Cal.) (order dated Aug. 5, 2011), do not
20 support this absolute position. Moreover, neither of these cases is instructive here.
21 Neither court offered an opinion as to its reasoning or rationale. It therefore is
22 impossible to speculate whether the courts were rejecting the applicability of medical
23 information to cases which are not raising personal injury claims, as Plaintiff
24 suggests, or whether they based their decisions on other arguments made – for
25 example, that the discovery was compound, that it was overbroad, or that it would not
26 reveal facts that could not have been found without that evidence. *See Bayer – Joint*
27 *Conference Statement regarding Bayer’s Motion to Compel Further Discovery*
28 *Responses; General Mills – Joint Stipulation on Motion of Defendant General Mills,*

1 Inc. and Yoplait USA Inc. to Compel Plaintiff to Answer Interrogatory No. 6 and
2 Request for Production No. 4.

3 Plaintiff also relies on the finding in *Slagle v. Superior Court*, 211 Cal.App.3d
4 1309, 1313 (1989), a case involving an automobile accident, that where “[p]etitioner
5 made clear . . . he was not seeking to recover for any injury to his eyes,” the patient-
6 litigant exception was not applicable. *Id.* Plaintiff overlooks, however, that the eye-
7 related discovery in that case – unlike the joint-related discovery at issue here – was
8 denied because the claims actually asserted in that lawsuit had nothing to do with the
9 petitioner’s eyes. *Id.* at 1311-1313. Pharmavite is not seeking discovery of irrelevant
10 medical information as was the case in *Slagle*. Nor is Pharmavite seeking
11 unrestrained and unlimited discovery as referred to in *Britt v. Superior Court*, 20
12 Cal.3d 844, 862-64 (1978), on which *Slagle* relied. *See Slagle*, 211 Cal.App.3d at
13 1313; *Britt*, 20 Cal.3d at 862-64 (attempting to compel plaintiffs’ “entire lifetime
14 medical histories”). Pharmavite is requesting narrow, targeted information about
15 Plaintiff related to her joint health and musculoskeletal system, on which Plaintiff’s
16 claims fundamentally are based.

17 Plaintiff also argues, in the alternative, that her medical information is
18 protected by a constitutional right to privacy. Plaintiff’s reliance on *John B. v.*
19 *Superior Court of Los Angeles County*, 38 Cal.4th 1117 (2006), however, is
20 misplaced. Plaintiff overlooks that the Court qualified the right to privacy, finding
21 that it “is not absolute. In appropriate circumstances, this right must be balanced
22 against other important interests.” *Id.* at 1199. These other important interests
23 specifically include the “‘important state interest of facilitating the ascertainment of
24 truth in connection with legal proceedings.’” *Id.* (quoting *In re Lifschutz*, 2 Cal.3d
25 415, 432 (1970)). As the Court explained, where a party places his or her medical
26 condition into issue, “privacy interests may have to give way to [the] opponent’s right
27 to a fair trial. Thus courts must balance the right of civil litigants to discover relevant
28 facts against the privacy interests of persons subject to discovery.” *Id.*, citing *Vinson*

1 *v. Superior Court*, 43 Cal.3d 833, 842 (1987). Indeed, the Court in *John B.* allowed
 2 the discovery sought (regarding extremely more invasive discovery of an HIV
 3 patient's sexual history and activity), limiting it only with regard to the specific time
 4 period. *Id.* at 169. The discovery sought here by Pharmavite is not overly broad or
 5 invasive in light of the claims raised by Plaintiff and Pharmavite's anticipated
 6 defenses, and is therefore appropriate.

7 Finally, it is important to note that this case is only in the relatively early
 8 discovery stage. Plaintiff attempts to paint a complex picture of class certification in
 9 anticipation of Pharmavite's goals in discovering her medical information. It is clear
 10 that parties disagree about the elements of proof in certifying a national class.
 11 However, at this stage in the litigation, parties are only seeking discovery, and it is
 12 well accepted that there is a lower threshold for what is discoverable than what is
 13 admissible or what is relevant at trial. Federal Rule of Civil Procedure 26(b)(1)
 14 permits broad access to discovery of "any matter relevant to the subject matter
 15 involved in the action."

16 CONCLUSION

17 It would be unfair and unjust to take Plaintiff's allegations regarding her joint
 18 health as true without further substantiation. Plaintiff has not advanced any reason
 19 why typical protective measures that could be taken by the parties and the Court
 20 would be inadequate in balancing her personal interest in privacy against the
 21 fundamental public interest in preserving an efficient and effective litigation process.
 22 Plaintiff has placed her medical condition into issue in this case, and Pharmavite
 23 therefore has a right to focused discovery relevant to that condition to assess her
 24 claims and support its defenses.

25 Dated: October 23, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2012, I electronically filed

**SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF
PHARMAVITE LLC'S MOTION TO COMPEL DISCOVERY**

with the Clerk of the court using the CM/ECF system, which will send a notification
of such filing (NEF) to the following:

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